VII. OPTIONS FOR CONSIDERATION

The following options are provided for discussion. They represent a compilation of alternatives proposed by various stakeholders and are not intended to serve as recommended actions. The list is summarized in Table 7, beginning on page 103. DHS Recommendations can be found in Section VIII, beginning on page 105.

Cost and availability of liability insurance are critical issues for California nursing homes and other residential long-term care facilities experiencing jumps in premiums and difficulties in securing coverage. LTC providers desire immediate solutions that will ensure the business of providing nursing home or residential care is one in which they can successfully operate. Consumer attorney organizations and advocates want to ensure that the solutions being considered will not limit the rights of nursing home residents.

From the perspective of state health policy, any actions taken to improve cost and availability of liability insurance must also consider other related questions:

- *Will Californians have a continuum of quality, LTC options as they age?*
- *Should government facilitate alternative insurance arrangements, using methods that minimize the influence of national trends? Are there other ways to separate or "de-link" California's insurance business from the global insurance market?*
- *Are there business incentives to support quality, financially stable LTC providers?*
- *How should liability insurance costs be considered in the Medicare/Medi-Cal rate methodologies?*
- *What consumer incentives to encourage LTC insurance coverage could reduce government's major funding role?*
- *When a resident suffers elder abuse in a nursing home, what provisions would strengthen the relationship between civil action and state enforcement action to ensure improved quality of care for all residents in that facility?*
- *What steps can California take to minimize financial risk in its dual role of protector residents and "payer of last resort" in the case of failed SNFs?*

1. INSURANCE INDUSTRY

In many ways the insurance industry is the purest form of a free market. Very simply, revenues must cover loses. However, that is the end of the simplicity. The structure and inter-relations of the insurance companies are intricate and complex. The system has consolidated into large multinational conglomerations, in which California's nursing home liability insurance concerns are only a minor piece of the operations.

The insurance market, similar to other industries, is highly cyclical in nature. Change in the competitive environment and available returns from investments can have a significant affect on the market. The market is currently "hardening," and insurance companies are narrowing their product offerings to focus on their core business. They are changing their policy and premium structure to respond to and anticipate the changes in the risk environment. The challenge in addressing options to ensure affordability in nursing home liability insurance lies in de-linking the industry from all the national and international activities beyond the sphere of influence of the California nursing homes.

Insurers, however, are already responding to the changes occurring in the market. While some companies are withdrawing product lines, others are looking for opportunities to move into the market niche. The insurance industry is very resilient. It is difficult to identify where the market is and where it is going. A short-term attempt to support the insurance rates may impede on the market correction being undertaken by the industry or threaten the existing insurance providers, causing their withdrawal from the California market. From an insurance perspective, possible policy options are enhanced information on this segment of the industry's activities; alternative insurance arrangements, and alternative reinsurance arrangements.

A. Annual Industry Report

The professional and general liability insurance market for LTC providers has undergone dramatic change in a short time period. The nursing home industry alerted the regulating agencies as to their concerns. Even with focused attempts to extract information, the data has been limited. Regardless of what decisions may be reached to facilitate the availability and affordability of liability insurance for nursing homes, ongoing monitoring will be necessary to measure any type of success. Regulators must also be watchful of crossover impacts on the assisted living industry.

Following a crisis in liability coverage for childcare providers, the CDI began publishing an annual focused report on the coverage and performance of admitted carriers offering lines of liability coverage for child care providers (Insurance Code Section 1864).

A report similar to that published for the state's childcare providers in the CDI's annual report could be developed for the nursing home and assisted living facilities. Such a report is of additional importance for the nursing home industry that has the predominance of funding tied to public payers. Increasing costs of liability insurance must be absorbed by the organization's operating budget. Significant increases in overhead costs will cause a fiscal strain on operations. The consequences of a facility going bare, without liability insurance, could be financial insolvency of the institution. The state will ultimately intervene in the occurrence of facility bankruptcies or abandonment—bearing unknown costs.

OPTION 1-A: *CDI could provide an annual report on the availability, affordability and insurance performance specific to nursing home and assisted living, general and professional liability insurance.* Mandate insurers engaged in writing nursing home liability insurance coverage are to submit an annual report of its operations in regards to claim experience, policies written and earned premiums.

<u>Advantages</u>

- Increases the amount of information available to the regulating agencies.
- Increases communication among CDI, DHS and DSS.
- Establishes a baseline to determine the affect of other policy actions.
- Provides consistently reported data for monitoring trends.

<u>Disadvantages</u>

- Increases administrative time and cost of compiling the information for reporting purposes.
- Includes only information from admitted insurers.

B. Insurance Rate Rollback

In 1988, a rate rollback was initiated for automobile policies. Every insurer was required to reduce its charges to levels that were at least 20 percent less than the charges for the same coverage in effect in 1987. The rates were only allowed to increase if an insurer could demonstrate a substantial threat of insolvency (Insurance Code Section 1861). Further, the Insurance Code stipulated specific criteria to be used to underwrite an automobile policy.

OPTION 1-B: *CDI produce a report for the Legislature to address whether a mandatory rate rollback for LTC liability insurance would be effective, and recommend underwriting criteria that should be used in determining low risk SNFs.*

<u>Advantages</u>

- Reduces rates for liability insurance.
- Establishes underwriting criteria to reward quality improvements through lower insurance premiums.

Disadvantages

- Deters admitted insurers from operating in California.
- Augments previous rate relief resulting from CDI's denial of requested base rate increases to admitted insurers.
- Potentially increases liability insurance for other industry segments.

C. Facilitate Captives

CDI has very limited ability to quantify what is happening in the marketplace outside of the information reported by the admitted insurers. Less than 6 percent of the licensed SNF beds in California are covered by these types of insurers. The first reaction as the insurance industry starts to experience difficulties, is a shift from admitted insurers to excess and surplus line insurers, which are not regulated by the CDI. CDI is therefore further limited in its ability to analyze or to respond to the condition of the marketplace.

Florida recently mandated **compulsory** liability insurance coverage by admitted carriers only. While the state is still awaiting enough information to determine the outcome, some observers question the likelihood of success.

Another venue for control comes from insurance companies choosing a state as their **domain**. Currently California is not a favored state for licensure by insurance companies or other forms of insurance vehicles. Hawaii and Vermont are two states that have a predominant share of the Risk Retention Group licensure. Texas and Illinois are also favored charters for Purchasing Groups. Other states are actively pursuing efforts to encourage domiciled captives, such as this option envisions.

OPTION 1-C: *CDI could convene a workgroup that will review the Insurance Code to identify changes that may enhance the attractiveness of the State of California for the licensure of insurance captives, Risk Retention Groups, and Purchasing Groups. Report these findings to the Legislature, including the review of other states' requirements and the advantages and disadvantages of such structures.*

Advantages

- Provides additional regulatory authority over insurance options without restricting the insurance market.
- Facilitates alternative forms of insurance, allowing state associations and professional groups to provide for insurance coverage for their members.
- Facilitates insurance options that can allow for underwriting credits to be given based on quality indicators and/or model practice guidelines.

Disadvantage

- Fails to create additional insurance or necessarily affect the market price.
- Requires insurers to continue to go to unregulated reinsurers.

- Potentially makes California a favored domain for out-of-state operations without enhancing coverage in California.
- Increases administrative cost of additional regulatory oversight of insurance operations, though offset exists with the fee structure of the CDI.

D. Joint Underwriting Association (JUA)

The State could establish a JUA to pool LTC liability insurance risk, and structure the underwriting criteria for the policies. The pool could be established through assessments on the participating insurance carriers, or directly funded by the issuance of bonds, or a combination of both funding mechanisms. With the current claims trends, reinsurance would need to be secured to limit the exposure of the pool and a limit on payout from the pool would be necessary. The State is now exposed to the cost of SNF bankruptcies if costs that might default to the State go beyond what is available in the State Citation Penalty Account. The financing of an insurance pool therefore may serve as a prudent expenditure.

After the Northridge earthquake in 1994, residential insurers grew concerned that another earthquake would exhaust their resources; in response, the California Legislature established the California Earthquake Authority (CEA). The CEA is a privately financed, publicly managed organization that offers basic earthquake insurance for California homeowners. State general fund moneys are not used in the pool reserves and are not at risk if the full amount of the reserves is expended. The creation of the CEA allowed the insurance companies to cede liability for the earthquake portion of the homeowner policies (Insurance Code Section 10089.5).

OPTION 1-D: *Authorize CDI to establish a JUA to manage professional and general liability insurance.*

<u>Advantages</u>

- Provides a benefit for admitted insurers to remain in the market with other associated products.
- Facilitates insurance options that can allow for underwriting credits to be given based on quality indicators and/or model practice guidelines.

<u>Disadvantages</u>

- Fails to create additional insurance or necessarily affect the market price.
- Requires the State to continue to use the reinsurance market for stop-loss. The State, however, would wield greater ability to negotiate the reinsurance terms.
- Increase administrative cost of additional regulatory oversight of insurance operations. However, the fee structure could include a mechanism to offset administrative costs.

E. Risk Reinsurance Model
One of the consistent factors underlying all insurance options is the reinsurance market, which has undergone tremendous losses in the recent years, including the billions of dollars paid out in association with the September 11th tragedies. The state could adopt a pooling structure to establish reinsurance for long-term care liability insurance.

OPTION 1-E: *The CDI to convene a workgroup to evaluate the precedence of a state reinsurance pool, potential pool structure, funding, and model the risk exposure and options to mitigate the exposure.*

Advantages
- Provides a benefit for insurers to stay in the market and for captive and pooled insurance arrangements to be established.
- Encourages insurance options that allow for underwriting credits to be given based on quality indicators and/or model practice guidelines.

Disadvantages
- Fails to create additional insurance or necessarily impact the market price.
- Increases administrative cost of additional regulatory oversight of insurance operations, though offset exists with the fee structure of the pool.

2. QUALITY OF CARE OVERSIGHT AND REIMBURSEMENT

In a recent national survey conducted by The NewsHour with Jim Lehrer, responses indicated that "Americans see an important role for nursing homes in providing care for those not able to care for themselves, yet they also voice significant concerns about the care provided in nursing homes."[1]

The continued concerns expressed by federal and state legislators, and the constant negative portrayal of nursing home care in the media, demonstrate that overall quality must be improved. The public must perceive nursing homes as part of an acceptable LTC continuum to ensure the continued availability of care options.

Almost 15 years ago, the federal government established a framework to ensure the provision of quality services to nursing home residents whose care is paid for by the Medicare and Medicaid programs. Today, CMS continues to take additional steps to emphasize quality of care, outcome measurement, and empowerment of consumers through provision of detailed information from which to evaluate nursing home care.

The Davis Administration quickly perceived that to improve LTC in California, quality needed to be defined in broader terms. He recognized the direct relationship between quality of care and the financial stability of the facility where care is being provided. Aging with Dignity, through legislation, the budget, and administrative actions, already has made significant stride to coordinate and strengthen the State's systems that oversee that oversee the provision of LTC services.

The nature of the insurance industry is to gain predictability and consistency. By further integrating performance and quality improvement into its nursing home oversight systems, government will be providing consumers and insurers information useful to evaluating positive performance of nursing homes in the area of quality and staffing.

A. Risk Management Plans

Risk management and loss control programs, quality assessment and assurance programs, and compliance programs, are all methods a nursing home may use to assess and correct systemic issues and problems that increase risk of a lawsuit or enforcement actions. The federal OIG believes that:

> "a comprehensive compliance program provides a mechanism that brings the public and private sectors together to reach mutual goals of reducing fraud and abuse, enhancing operational functions, improving the quality of health care services and decreasing the cost of health care."[2]

California currently has no requirements that a nursing home establish a risk management program. A SNF must have a patient care policy committee, an ongoing staff development program, and must have a committee to meet quarterly to identify issues applicable to quality assurance, and implement appropriate plans of action for identified quality deficiencies.

This focus on quality improvement is similar to a focus on risk reduction in that both address the same situation, but from two different perspectives. Insurance companies would like to be confident that nursing homes are also monitoring their internal activities from the risk management perspective, correcting practices that are known to have a high litigation risk.

OPTION 2-A: *Encourage or require nursing homes to develop and utilize a risk management program that contains specific predefined elements. Establish incentives related to quality recognition, liability insurance pool eligibility or rate considerations for facilities that operate an approved type of risk management program.*

<u>Advantages</u>

- Supports nursing home efforts to improve internal review and improvement mechanisms.

- Allows insurance companies to use information as a tool to assess effectiveness of a facility's internal risk management systems when determining whether to write a policy.

Disadvantages

- Requires increased facility costs/staff to develop and implement system.
- Requires increased DHS staff to develop and implement a review/approval process.
- Fails to directly affect the availability or market price for liability insurance.

B. Nursing Home Liability Insurance Data from Existing Sources

Basic data on liability insurance coverage in nursing homes would improve DHS' ability to assess changes in the market, and to monitor for financial stability. At the present time, DHS does not attempt to determine the status of liability insurance coverage for the nursing homes it licenses; however, DHS does have access to liability insurance information for facilities participating in the Medicaid program.

Facilities participating in the Medi-Cal program are required to report financial and utilization data annually on the Long-term Care Facility Integrated Disclosure and Medi-Cal Cost Report.[3] While costs for liability insurance premiums are not specifically identified on the form, they are included in the Administration cost center on the form.

The reports filed by nursing homes consist of financial statements and supporting revenue and expense schedules, utilization statistics, and other facility information. When the reports are submitted by facilities, they are entered into the OSHPD database and are desk-audited. DHS uses OSHPD data in the development of its nursing home rates. DHS, A&I Branch, audits some portion of nursing homes participating in Medi-Cal each year. Staff review all aspects of a facility's financial reports at that time, including liability insurance premium payments and other cost information related to litigation.

According to the CDI data call conducted in 2000 (see Section II, page 11), only 185 nursing homes had liability insurance coverage from admitted insurers. CDI has the capability to continue to conduct such data calls to determine liability insurance trends among admitted insurers, but few nursing homes appear to be covered by admitted insurers. Unless significant changes occurred in the insurance market, future data calls would continue to provide information for only a limited segment of California's LTC providers.

Aon Risk Consultants, Inc, in its February 2002 actuarial analysis of "Long Term Care General Liability and Professional Liability," based its California information on voluntarily submitted data from SNFs representing 22 percent of beds in the State[4] (see Section II, page 14). Without a higher level of voluntary participation from SNFs in California, trend information could be misleading. For example, CMS data about the 10 nursing home companies with the largest bed counts indicate that they own 18.46 percent of beds nationwide. If a significant number of the 22 percent of beds voluntarily reported consisted of beds owned by these 10 companies, the data might not provide an accurate picture of liability insurance costs and availability for all nursing home providers in the state.

DHS can conduct a survey of California nursing homes, requesting them to voluntarily submit information regarding their policy structure and the liability insurance options they are utilizing. If the facility response rate to the survey is high, the information could be useful in developing a current picture of nursing home experience with liability insurance.

OPTION 2-B: Utilize existing sources of information more effectively to identify trends in the cost and availability of liability insurance for nursing homes. These would include:

- *CDI information from admitted insurers;*
- *OSHPD information from the Long-term Care Facility Integrated Disclosure and Medi-Cal Cost Report;*
- *DHS information from the MCS, Rate Development Branch and from the A&I audits of nursing facilities that participate in the Medi-Cal program; and*
- *A voluntary survey of nursing homes.*

<u>Advantages</u>

- Provides data to utilize for developing policy decisions related to liability insurance.
- Secures data from existing sources, and would not require legislation.

<u>Disadvantages</u>

- Fails to provide comprehensive and consistent data to utilize for developing policy decisions related to liability insurance.

C. Nursing Home Liability Insurance Data as a Condition of Licensure

As discussed in Option 2-B, nursing home liability insurance coverage data would improve the DHS ability to assess the affect of changes in the insurance market. For an option that would require a statutory change, DHS could mandate that nursing homes licensed in California provide specific information on liability insurance coverage as part of the application process. The facility also would notify DHS whenever changes occurred in the policy.

While such a system provides consistent and comprehensive information that can be used for developing policy decisions related to liability insurance, it also requires sufficient DHS staff to collect, evaluate, and manage the data submitted.

From a provider perspective, liability insurance premium and coverage data collected by DHS would be subject to Freedom of Information Act requirements. In Florida, every SNF now must purchase liability insurance. A recent provider industry publication cites an insurer that anticipates the statute will result in SNFs "purchasing compliance policies—plans that offer little coverage but that ensure compliance with state laws."[5] To protect liability insurance data from public disclosure, SNFs may approach a liability insurance data mandate in the same manner.

Option 2-C: Require nursing homes to provide DHS basic information on liability insurance coverage, at the time of application and annually thereafter (including an update if circumstances change during the year).

Advantages
- Provides comprehensive data to utilize for developing policy decisions related to liability insurance.

Disadvantages
- Fails to provide DHS authority for any action other than compilation of data.
- Fails to affect the availability or market price for liability insurance.
- May discourage SNFs from securing adequate liability insurance coverage.
- Increases DHS administrative time and cost of compiling the information for reporting purposes.

D. Skilled Nursing Facility Financial Solvency Advisory Board (SNFFSAB)
AB 1731 established the SNFFSAB, part of the Governor's Aging with Dignity Initiative. The Board will consist of a panel of experts to advise DHS of appropriate financial standards for facilities and methods to monitor facility financial standards. Information gathered for this report has identified that the availability and cost of liability insurance for a facility can affect quality of care and financial solvency.

OPTION 2-D: *Ensure the SNFFSAB includes a representative with expertise related to the insurance industry. Require the Board to advise the DHS director as to the implications for financial solvency standards of the data on liability insurance rates.*

Advantages
- Ensures a member with insurance industry expertise is involved in developing fiscal solvency requirements for facilities.

Disadvantages
- Fails to directly affect cost and availability of liability insurance for nursing homes.

E. Nursing Home Liability Insurance Coverage as a Condition of Licensure
If a nursing home cannot secure liability insurance or cannot afford the premium, and decides to carry no liability insurance at all, the financial stability of the facility is at a much greater risk. Colorado, Utah, and Pennsylvania already have

a requirement for liability insurance coverage. Florida and Texas recently passed legislation that requires liability insurance as a condition of licensure. In both states, provider concerns already have been expressed regarding the effectiveness of the requirement (see Section VI, What Happened in Florida, page 70; and Section VI, What Happened in Texas, page 72).

OPTION 2-E: *Require nursing homes to demonstrate proof of liability insurance coverage as a condition of licensure.*

Advantages
- Reduces risk that a nursing home would go bankrupt because of insufficient funds to cover a lawsuit settlement or judgement.
- Provides comprehensive data to utilize for future policy decisions related to liability insurance.

Disadvantages
- Requires staff to develop and implement policies and procedures to determine compliance with the requirement. Also requires staff to monitor and review data.
- Could result in closure of nursing homes unable to secure coverage.
- May discourage SNFs from securing adequate liability insurance coverage.
- Fails to necessarily affect the availability or market price for liability insurance.

F. Establish Incentives Related to Liability Insurance to Support Nursing Homes Improvements to Quality of Care.
Nursing homes play an essential role in California's LTC system. Published articles and discussions with representatives of the insurance industry and the health care provider industry confirm providers are experiencing increases in premiums for liability insurance.

If the State can assist nursing homes that meet specific quality-related criteria to secure liability insurance coverage, that assistance might ensure consumers continued access to adequate, high quality LTC facility options. Such support could be provided using a variety of methods, including monetary subsidies.

The quality criteria could be similar to the criteria for AB 1731 quality awards facilities, or could utilize CMS data similar to the pilot being implemented in Colorado, Maryland, Ohio, Rhode Island, and Washington (see Section III, page 32). The criteria could be based on an agreement model, similar to the OIG Corporate Integrity Agreements (see Section IV, page 56). To receive assistance with liability insurance, the facility might agree to a risk management program or to an enhanced level of staffing. The assistance might take the form of eligibility for coverage through a state JUA (should such an option be adopted). Assistance also might be included under a facility-specific rate.

Another example illustrating the type of creative support that could be fashioned to assist the long-term care facilities is the model of the California Partnership for Long-term Care. The Partnership's LTC policy offers incentives to individuals to secure LTC coverage, in cooperation with a select number of private insurance companies. These companies offer high quality policies that must meet stringent requirements set by the Partnership and the State of California. When the policyholder needs care, the policy pays for the care, but for each dollar the policy pays out in benefits, it entitles the policyholder to keep a dollar of assets should she or he ever need to apply for Medi-Cal benefits. A similar creative public-private partnership may be an option for designing rewards or subsidies for exemplary facilities to assist them in purchasing liability insurance.

OPTION 2-F: *Develop programs for nursing homes that can meet quality related criteria to assist in securing adequate liability insurance coverage.*

<u>Advantages</u>

- Supports access to an adequate, quality, continuum-of-care.
- Supports and encourages exemplary facilities through incentives to provide quality of care improvements.

<u>Disadvantages</u>

- Requires staff to develop and implement procedures and negotiate and manage agreements with facilities.
- Fails to directly affect the availability or market price for liability insurance.
- May require general fund expenditures to implement.

3. CIVIL LAW

The Medical Injury Compensation Reform Act (MICRA) of 1975 and the Elder Abuse & Dependent Adult Civil Protection Act (EDACPA) of 1991 form a strong foundation of civil law in California. Both acts recognize the importance of health and safety considerations, and the right of individuals, especially the elderly and dependent, to protection from abuse and neglect.

MICRA prescribed parameters for civil actions at a time when the Legislature determined that escalating malpractice insurance costs threatened access to medical treatment for California citizens. EDACPA provided enhanced remedies for elderly victims of abuse when the Legislature determined that without such special provisions, deserving individuals were systematically being denied cause of action.

Unlike states such as Florida prior to 2001, the terminology and burden of proof requirements for civil liability and elder abuse cases in California statute are quite specific. Neither provider organizations nor consumer advocates are arguing that provisions for MICRA or EDACPA should be eliminated. The debate surrounds three issues:

- Is access to long-term institutional health care for Californians being threatened due to the impact of lawsuits filed under EDACPA?
- Are modifications possible to the enhanced remedies under EDACPA that would continue to provide protections to victims, but would also encourage insurers regarding the stability and level of risk associated with the long-term industry as a whole?
- When a resident suffers elder abuse in a nursing home, what provisions would strengthen the relationship between civil action and State enforcement action to ensure improved quality of care for all residents in that facility?

A. Enhanced Information on Lawsuits, Settlements, and Awards in California

DHS does not have sufficient data on civil actions against nursing homes to demonstrate whether current MICRA and EDACPA provisions threaten Californians' access to LTC options. While H&S Code 1305 does include language that requires liability insurers to report to DHS on specific nursing home claims and settlement information, that 30 year requirement was never implemented. Data has been gathered by a variety of organizations but the information currently available on the impact of lawsuits, settlements, and awards is mainly anecdotal. Examples include:

- Information is available from an individual California insurer that the number of claims in California is not growing dramatically, but the severity, or cost of individual claims, is significantly above the average for other states. The experience of this insurer, however, was limited to less than 13 percent of California nursing homes.
- The February 28, 2002, Aon report on liability insurance confirmed that growth in numbers of claims was not substantial in California, but the increase in cost was more significant. The information provided by nursing homes to Aon was voluntarily submitted by only 22 percent of California facilities.
- VerdictSearch is the research service of the National Law Journal's litigation services network. In January 2002, Consumer Attorneys of California, a professional association for attorneys who represent plaintiffs/consumers, requested that VerdictSearch research elder abuse or nursing home negligence cases where awards were made for the period 1995 to present. While some settlement information was also provided, this information had been voluntarily submitted. In many cases, the information was designated confidential, so it was unclear which nursing home had been affected.
- GeneralCologne Re conducted a study of 58 voluntarily reported verdicts and settlements for long-term care providers and concluded that claims costs are escalating and that multimillion dollar verdicts and settlements have replaced the more moderate payments previously associated with personal injuries awards to individuals with a short life expectancy and minimal wage loss.

In the last two years, a number of states have begun instituting changes to increase available information regarding court decisions relevant to public health and safety:

- Florida legislation aimed at improving the liability insurance situation for LTC providers included a provision to require facilities to report monthly any liability claim filed against it. The report must include the name of the resident, the date or dates of the incident leading to the claim, if applicable, and the type of injury or violation of rights alleged to have occurred. This report is confidential as provided by law and is not discoverable or admissible in any civil or administrative action, except in such actions brought by the enforcement agency.[6]
- In September, 2002, "South Carolina's 10 active federal trial judges unanimously voted to ban secret legal settlements, saying such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors and sexually abusive priests."[7] If the court formally adopts the rule after a public comment period that ends September 30, 2002, it will be the strictest ban on secrecy in settlements in the federal courts.
- On October 1, 2002, Governor Davis signed SB 1572 (Sher), that requires private persons settling any violation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) to report to the AG, regarding the settlement and the final disposition of the case. The AG may provide factual information to specified attorneys involved in related cases, "but in all other respects the Attorney General shall maintain, and ensure that all recipients maintain, the submitted information as confidential official information to the full extent authorized in Section 1040 of the Evidence Code."[8]
- In September 2002, the Governor also signed SB 1950 (Figueroa), that includes provisions to expand the public information available regarding malpractice claims maintained by the Medical Board of California. Existing law requires every professional liability insurer to report to the appropriate medical board any settlement over $30,000 and any judgments or awards in any amount of a malpractice claim or action against a licensee of that board. Prior to this legislation, settlements were not considered public information.
- On October 15, 2002, the Administration announced a consumer protection initiative to protect nursing home residents. One of its provisions required nursing homes to report to DHS all civil court actions filed against them.

OPTION 3-A: *Require every professional liability insurer or every SNF to report to DHS regarding liability claims filed against a facility, and settlements, judgments, and awards against a facility.*

<u>Advantages</u>

- Enables DHS to have baseline data that identifies the frequency and severity of the cases affecting nursing homes in the state for use in policy analysis and review of enforcement actions.

Disadvantages

- Providers may oppose provisions that result in the disclosure of information that may be perceived by the public as damaging to the reputation of the facility.
- May create a disincentive for providers to settle cases, especially when they do not believe they are at fault.

If data demonstrates that access to long-term health care is being threatened by the current provisions of MICRA and EDACPA, the options described below identify several points in these processes where changes could be made.

B. Pre-Suit Requirements

California presently requires the plaintiff to notify the facility of its intent to file a medical liability or elder abuse claim. According to the Code of Civil Procedures, no action based on professional negligence can be filed before giving a 90-day notice.

Of the lawsuits related to elder abuse that reach the media, the victim or family often express a desire for prevention or deterrence as the reason for the lawsuit. Pre-suit action that ensures future compliance or correction of the systemic cause that led to the elder abuse situation could reduce the need for judicial relief in some situations. In California, however, consumer advocates have opposed efforts at forced arbitration, mediation, or dispute resolution in lieu of lawsuits.

OPTION 3-B: *Establish provisions related to arbitration, mediation or DHS regulatory enforcement that must occur during that 90-day period.*

Advantages

- May decrease the number of claims filed against the facility, which could improve insurability of the facility.

Disadvantages

- May place further pressure on the plaintiff to settle when any offer to mediate or arbitrate is made by the defendant.

C. Reduce Statute of limitations

In an action against a health care provider based upon professional negligence, California has a three-year limitation under MICRA (or one year after the plaintiff discovers the situation, whichever comes first). EDACPA carries a one-year limitation during which a plaintiff may file a lawsuit. While this option has been included because other states have considered such limitations in addressing the liability insurance issue, due to current stringent limitations, in California the effectiveness of this option may be limited.

OPTION 3-C: *Shorten the statute of limitation for MICRA to less than three years.*

Advantages
- May provide limited improvement in the ability of the insurer and the provider to predict losses.

Disadvantage
- May decrease the ability of a person to discover a potential cause of action, if such information is not readily apparent.

D. Specify the Method for Determination of "Reasonable Attorney's Fees"
Nursing home provider organizations and insurance industry representatives believe that current provisions that allow attorneys to be reimbursed for their fees in elder abuse cases, leads to inflated costs that are not necessarily commensurate with the outcome for the plaintiff. A more structured definition of "reasonable" could protect the rights of elder abuse victims without encouraging unnecessary litigation that increases liability insurance costs.

Section 15600 (j) of the Welfare and Institutions Code states the intent of the Legislature to enable interested persons to "engage attorneys to take up the cause of abused elderly persons and dependent adults." Prior to passage of EDACPA, few civil cases were brought in connection with elderly abuse due to the lack of incentives to prosecute. MICRA provisions assumed clients in the prime of life, not in their waning days, or even after death. A percentage of compensatory damages for an attorney might not be sufficient to take the case of an elder who could not demonstrate significant lost wages or lost years of life.

OPTION 3-D: *Define "reasonable" attorneys' fees in more specific terms in the EDACPA statute, or establish a necessary relationship between "reasonable attorneys' fees" and the specific case.*

Advantages
- May decrease the number of elder abuse claims filed against facilities that may reduce liability insurance costs.

Disadvantages
- May increase the elder and dependent adults who experience abuse or neglect but are unable to secure civil action.

E. Modifications to Requirements for Punitive Damages

Punitive damages "punish" the defendant for egregious, deliberate, or harmful misconduct. Punitive damages normally are not insurable and are paid directly by the nursing home. A punitive damage claim, however, also increases the overall amount for which an action may be resolved. Nursing home providers argue that the use of punitive damages under provisions of EDACPA treats nursing home defendants differently from other health care providers under other medical malpractice law. They believe this erosion of MICRA directly affects the cost and availability of liability insurance.

Consumer advocate groups believe California nursing home verdicts, including punitive damage awards, encourage decent care and are a vital check to balance the health care system. In Florida's recent legislation to address problems with liability insurance for nursing homes, any award of punitive damages is to be divided between a plaintiff and the state's Long-term Care Facility Improvement Trust Fund.

OPTION 3-E: *Consider one of the following alternatives: 1) Place a cap on punitive damages; 2) Create a scale of "contingency fees" for attorneys based on the amount of the punitive damage award (the higher the judgement, the smaller the percentage to be claimed by the attorney); or 3) Establish provisions that allocate a portion of awards going to attorneys beyond a specific level to fund enforcement and improvements to quality of care in nursing homes.*

<u>Advantages</u>

- May reduce the number of claims filed and/or the size of the awards that may result in reduced liability insurance costs for facilities.

<u>Disadvantages</u>

- May discourage elders and dependent adults who experience abuse or neglect from securing civil action.

F. Criminal Investigation of Cases Awarding Punitive Damages

Punitive damages were created by the courts to punish defendants for egregious conduct and, for the sake of example, to deter others from similar conduct. DHS currently works closely with the Bureau of Medi-Cal Fraud and Elder Abuse within the AG's Office on elder abuse cases. Whenever DHS receives a complaint that alleges abuse, neglect, or misappropriation of resident funds or property, DHS notifies and faxes a copy of the complaint to the Bureau upon receipt. DHS continues to investigate the complaint and provides documentation and assistance should the Bureau decide to prosecute. If cases result in multi-million dollar punitive damage awards, a focused study might be in order to determine the effectiveness of the current regulatory enforcement system in these cases where individuals needed to privately seek judicial relief.

OPTION 3-F: *DHS, in consultation with the Bureau of Medi-Cal Fraud and Elder Abuse, will carefully review and report on a sample of cases known to have resulted in high punitive damage awards. A multi-disciplinary team will analyze the relationships between enforcement actions and the court cases against the facilities.*

<u>Advantages</u>

- Provides DHS with further baseline data to identify the frequency and severity of the cases affecting nursing homes.

Disadvantages
- Requires staff or contractor to conduct research and analysis of available information.

G. Limits on Admissibility of Licensing Inspections and Citations as Evidence

L&C conducts on-site inspections of licensed health facilities on a periodic basis, and in response to complaints filed by the public. At the completion of the inspection, surveyors prepare a report to the facility listing violations of various laws and regulations. The facility is then required to prepare a POC. After DHS accepts the POC, a follow-up visit can be scheduled to ensure that all needed corrective actions have been taken. The policy behind this process is straightforward—when problems are found in health facilities, those problems should be corrected as soon as possible.

L&C's inspection findings can be, and are currently used in civil litigation, particularly with respect to nursing homes. Neither the act of providing a POC, however, nor its contents or implementation, may be used in any legal proceeding as an admission by the facility that the violation leading to the POC occurred. This is consistent with Evidence Code provisions that evidence of remedial conduct cannot be used to prove negligence or culpable conduct related to the event that caused the remedial action to be taken. The policy premise is to promote timely and appropriate remedial action. Current law does not absolutely prohibit admission of a POC into evidence, but the courts allow it only within the context of the Evidence Code.

OPTION 3-G: *Limit admissibility of state and federal enforcement documents as evidence in a civil action, except when they directly relate to the facts of the case.*

Advantages
- For providers, ensures the information is used for its intended purpose, remedial action to bring about compliance with the Medicare and Medi-Cal programs.

Disadvantages
- For consumer advocates, litigants would be denied a valuable tool for establishing a pattern and practice of poor care. Without this information, any abuse or neglect case can look like an isolated incident.

4. CONSUMER ACCESS TO QUALITY LONG-TERM CARE

The aging population is growing. In federal testimony by William Scanlon, Director of Health Care Issues, at a March, 2001, hearing of the U.S. Senate Committee on Finance:

> Providing and financing long-term care will become even more challenging in just over a decade when the 76 million baby boomers begin to turn 65. Over the next 30 years, the number of elderly individuals is expected to double. Moreover, with baby boomers expected to live longer and greater numbers reaching age 85 and older, this generation is expected to have a dramatic effect on the number of people needing long-term care services, as the prevalence of disabilities and dependencies increases with age.[9]

According to a recent brief published for a congressional health policy conference, "while future demand for long-term care services may exceed supply, providers have difficulty meeting even current need."[10] Nursing homes are one of a number of care options necessary to serve this increasing elderly population, yet data indicate their numbers are going down.

In the CMS ***Nursing Home Data Compendium 2000****,* the number of nursing homes certified to participate in the Medicare and/or Medicaid programs has decreased from 17,253 (in 1997) to 16,847 (in 2000). Nursing home occupancy rates have been decreasing since 1996. In 1996, the occupancy rate was about 85 percent, and in 2000, the occupancy rate was about 82 percent.[11]

Nine million Californians will be over the age of 60 by 2020. What continuum of care will be in place two decades from now? Will there be sufficient caregivers to support the available options? What information will assist Californians in their health decisions? Liability insurance for long-term care providers is only one of the myriad of issues affecting the state's long-term care system.

Health care in the United States is a business enterprise, and consideration must be given to the need for balancing the viability of the business and the implications this has on access to care. At the same time, quality equates to good business. DHS and all the LTC stakeholders concur that providing quality care to the elderly is the number one concern.

A. Access to a Continuum of Quality Care Options

The focus of this report has been cost and availability of liability insurance for LTC providers. While the majority of the literature on the subject relates to nursing homes, escalating liability insurance costs and difficulties in securing coverage play a significant role in the financial picture for all types of senior housing. Governor Davis signed legislation in 1999 to establish a Long-Term Care Council (LTCC). One of its main objectives was to create a framework to address issues collaboratively across state departments that affect quality and access to long-term care.

OPTION 4-A: *After reviewing the report on Liability Insurance for California Long-Term Care Providers, LTCC will determine the appropriateness of the recommendations to other LTC provider types. The Council will also assess what further steps they will implement regarding the liability insurance issue to ensure* *a quality, continuum of care, and services will remain in place for the state's future dependent and elderly.*

Advantages
- Ensures that further study of the problems with cost and availability of liability insurance will be conducted to determine their full effect on access to all aspects of the LTC continuum.

Disadvantages
- Fails to affect the availability or market price for liability insurance.

B. Long Term Care Insurance Tax Credit
CMS, in a recent market update report, found that the per diem rates a nursing home receives steadily decline as a resident moves along each step from Medicare to private pay to Medicaid. The Medicare rate of growth has dropped significantly for nursing homes since the Balanced Budget Act of 1997; and Medi-Cal pays for the majority of nursing home costs in California.

Long-term care insurance is the only factor likely to reduce reliance on Medi-Cal as the primary financial resource for nursing home care.

Option 4-B: *Introduce legislation that would provide a state tax credit for the premiums consumers pay to maintain long-term care health insurance.*

Advantages
- Encourages consumers to secure long-term care health insurance.
- Potentially reduces government's role of primary payer for nursing home care.

Disadvantages
- Reduces State revenues.
- Fails to affect the availability or market price for liability insurance.

[1] The Health Unit, op.cit.
[2] "Publication of the OIG Compliance Program Guidance for Nursing Facilities," in *Federal Register,* (Vol. 65, No.52), March 16, 2000, p. 14289.
[3] *Aggregate Long-Term Care Facility Financial Data for California Report Period Ending December 31, 1997-December 30, 1998,* OSHPD, p.xi.
[4] Bourdon, op.cit.
[5] Jeff Smokler, "Florida Legislature Addresses Liability Insurance Crisis," in *Provider,* American Health Care Association, July 2002, p. 10.
[6] 2001, Internal risk management and quality assurance program, Florida Statutes. Section 400.147.
[7] Adam Liptak, "South Carolina Judges Seek to Ban Secret Settlements," in *New York Times,* September 2, 2002.
[8] Health and Safety Code, Section 25249.7(i).
[9] William Scanlon, *Long-Term Care Baby Boom Generation Increases Challenge of Financing Needed Services,* U.S. General Accounting Office (GAO-01-563T), March 27, 2001, p.1.
[10] Cubanski, op. cit.
[11] *Nursing Home Data Compendium 2000,* Centers for Medicare and Medicaid Services, p.1.

TABLE 7.

ALTERNATIVE OPTIONS IMPACT

Alternative Options Impact	Quality Improvement	Elder Abuse Protections	Funding Streams	Facility Financial Stability	Insurance Market Stability	Long Term Care Continuum
1. Insurance						
A. Annual Industry Report				**YES-**Data		
B. Insurance Rate Rollback				**YES-**Lower rates	**NO-**Insurers may leave CA	**YES-**Help other LTC
C. Facilitate Captives	**YES-**If tied to quality indicator			**YES-**Increase options	**YES-**Improve CA as domain	**YES-** Help other LTC
D. Joint Underwriting Association (JUA)				**YES-**Increase options	**YES-**Incentive to stay in CA	
E. Risk Reinsurance Model				**YES-**Increase options	**YES-**Incentive to stay in CA	
2. Quality Oversight and Reimbursement						
A. Risk Management Plans	**YES-**Internal oversight		Increase SNF costs	**YES-**Internal oversight	**YES-**May help get coverage	
B. SNFs Report Liability Insurance				**YES-**Data		
C. SNFFSB				**YES-**Insurance industry perspective		
D. SNFs Maintain Liability Insurance	**YES-**Less risk		Increase SNF costs	**YES-**Less risk		**NO-**May be less SNFs
E. Incentives- Liability Insurance and Quality of Care	**YES-**If tied to quality		Increase M-C costs	**YES-**Increase options for some		**NO-**May be less SNFs

ALTERNATIVE OPTIONS IMPACT

Alternative Options Impact	Quality Improvement	Elder Abuse Protections	Funding Streams	Facility Financial Stability	Insurance Market Stability	Long Term Care Continuum
3. Civil Law						
A. Report Lawsuit/Settlement/Award Data	**YES-**Data tied to quality	**YES-**Data tied to quality		**YES-**Data for baseline		
Modify EDACPA Processes *A. Pre-Suit Requirements* *B. Reduce Statute of Limitations* *C. Define Reasonable Attorneys Fees*		**NO-**May reduce elder access to file suit. (for A,B,C)		**YES-** May reduce claims	**YES-**Insurers indicate would reduce risk	**YES-**LTC providers indicate it would reduce risk
D. Punitive Damages Cap and Funding Enforcement	**YES-**some $ tied to quality	**YES-**tied to deterrence				
E. Criminal Investigation of Punitive Damages	**YES-**If effective deterrence	**YES-**tied to deterrence				
F. Admissibility of Enforcement Documents as Evidence		**NO-**Need to establish pattern		**YES-**May reduce claims		
4. Consumer Access						
A. Long Term Care Council Workgroup						**YES-**affects all LTC
B. Long Term Care Insurance Tax Credit			Increase the % of LTC insurance payments.	**YES-**Increase the % of LTC insurance payments.		